No. 11591

United States Circuit Court of Appeals

For the Ninth Circuit

FRED GERARD and ROSE GERARD,

Appellants,

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife and FRED SHUPE,

Appellees.

Brief of Appellants

S. J. Rigney,
Cut Bank, Montana,
Attorney for Appellants.

Upon Appeal from the District Court of the United States for the District of Montana

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.....Clerk

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JURISDICTION

This is an appeal from an order dismissing complaint of plaintiffs on motions of various defendants for a dismissal of the complaint, and judgment of dismissal of the district court of the United States for the district of Montana, Great Falls, Division, wherein these appellants were plaintiffs and United States of America, J. L. Sherburne and Eula Sherburne, husband and wife, G. S. Frary and Bessie L. Frary, his wife, W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, Guy McConaha and Ida McConaha, his wife, Fred Shupe were defendants.

The judgment, in effect, dismissed the complaint and has operated to prevent the plaintiffs from prosecuting the action perpetually. R. 26-39. The jurisdiction of the United States court was predicated upon the fact that the plaintiffs were and are enrolled blood members of the Blackfeet Tribe of Indians of Montana, and Wards of the United States, and were issued allotments on the Blackfeet Indian Reservation, and trust patents were issued to each of the plaintiffs on or about February 28, 1918; these trust patents contained the 25 year period restriction on alienation, and the further provision that the United States would at the end of the trust period convey the land to the allottees or their heirs free and clear of all incumbrances. The United States was made a party defendant for the reason that title was alleged

to be in the United States and the said court had held in a former action brought by the plaintiffs that the United States was a necessary party. 62 F. Supp. 28.

The action was further based on section 24 (1) (24) of the Judicial Code, 28 U. S. C. Section 41 (1) (24); Section 345 of Title 25 U. S. C. A.; and also under and by virtue of various treaties duly entered into and adopted by and between the Blackfeet Tribe of Indians and the United States, and particularly the treaty commonly known as the Agreement of 1887, executed February 11, 1887, and ratified May 1, 1888, 25 Stat. 113, particularly section VI of said agreement; and the Treaty of 1896 commonly known as the Treaty of 1896, ratified September 26, 1896, (Art. 9 of said agreement) 29 Stat. 358; and the General Allotment act of February 8, 1887, 24 Stat. 388, Section 348 of Title 25 U. S. C. A. (R. 2-3).

The appellate jurisdiction of the United States Court of Appeals is found in Section 225, Title 28, U. S. C. A. (first paragraph Judicial Code, Section 128, as amended), wherein the Circuit Court of Appeals is given jurisdiction in all cases, save those in which there is a direct appeal to the Supreme Court of the United States. No such direct appeal is permissible in this case (section 345, Title 28 U. S. C. A.).

STATEMENT OF CASE

The complaint filed September 20, 1945, in the district court for the District of Montana, Great Falls Division, (R. 2-14) substantially alleges that the

plaintiffs, Rose Gerard and Fred Gerard, are Indian persons, Wards of the United States, and under the charge of the Superintendent of the Blackfeet Indian Reservation in the state and district of Montana (R. 3, 4, 5); that each of said plaintiffs was allotted 320 acres of land on the said Blackfeet Indian Reservation,—Rose Gerard, Allotment No. 2192 (R. 4) and Fred Gerard No. 2191 (R. 5) and that on February 28, 1918, trust patents were issued to the plaintiffs (R. 5-7); that said trust patents contained identical provisions restricting alienation for a period of 25 years from the date of issuance of trust patent, and also the promise of the United States "that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty five years, in trust for the sole use and benefit of the said Indian and at the expiration of the said period the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and encumbrance whatsoever:" etc. (R. 6-7).

Prior to the expiration of the trust period, on or about the 11th day of June, 1918, a fee patent was issued to each of said appellants without application therefor by appellants, or either of them, and without their consent. These fee patents were forced on the appellants; there never was any finding of competency. That said fee patents and each of them were issued in direct violation of the Treaty of 1887 (supra), and the General Allotment Act of February

8, 1887, 24 Stat. 388, Section 348 Title 25 U. S. C. A. (R. 7-10).

That directly after the issuance of the **forced** fee patents in 1918, the lands so allotted and patented to the appellants were placed on the tax rolls of Glacier County, Montana, and taxes were levied and assessed against said lands each and every year after 1918 until the present. That said taxes so assessed and levied were null and void; that said taxes were not paid; that said taxes became delinquent and Glacier County attempted and purported to sell the same for delinquent taxes, later took a tax deed for both of said allotments, and thereafter conveyed its tax deed title to W. R. McDonald, about the 25th day of October, 1930; that the claims of all the defendants, except the United States, are based on the Tax Deed taken by Glacier County for alleged and purported taxes assessed and levied by Glacier County and allowed to become delinquent (R. 10-11).

That neither of said appellants were ever found competent by the United States to receive a fee patent; that neither of the appellants ever applied for or consented to the issuance of a fee patent; that fee patents were issued to each of said appellant's within four months after the issuance of the respective trust patents, and were **forced** on the appellants by the United States. (R. 11-12). Evidence of forcing the fee patent is corroborated by the Departmental letter of April 24, 1918, from J. H. Dortch, Acting Chief Clerk to F. C. Campbell, Special Superintendent in

charge, Blackfeet School. Every material point in case of U. S. v. Glacier County, 17 F. Supp. 411, 99 Fed. 2d. 733, is applicable.

That the defendants, other than the United States, claim some right, title or interest in and to the lands described in the complaint, but that such claim of right is without legal foundation and totally void and should be so determined by this court. (R. 12-13).

The defendants moved for dismissal as follows: The United States on the ground the Court had no jurisdiction, and the United States had not consented to be sued. (R. 15).

J. L. Sherburne and his wife on the grounds that complaint fails to state a cause of action or claim. (R. 15-16).

G. S. Frary and Bessie L. Frary on the grounds that complaint fails to state a claim on which relief can be granted in favor of complainants or either of them, or against these defendants. (R. 16-17).

The defendants, W. H. Mercer and wife, and Milton Mercer and wife on the same grounds as in case of G. S. Frary and wife. (R. 17).

The defendant, Fred Shupe, on the ground: (1) that the complaint fails to state a claim against this defendant; (2) that the right of action, if any, did not accrue within ten years next before it was commenced; (3) that the court is without jurisdiction, and (4) that the United States is an indispensable party to the action and it has not consented to be sued. (R. 18).

The defendants, Guy McConaha and wife, on the

ground the court lacks jurisdiction, and that the United States is an indispensable party and has not consented to be sued. (R. 24-25).

Summons was duly issued, served and returned. (R. 20-24). All the defendants appeared by motion to dismiss and the legal effect of each motion to dismiss was based on same grounds:

(1) The United States was and is an indispensable party and was made a defendant without its consent;

(2) The complaint was a collateral attack on a fee patent issued by the United States;

(3) That the complaint was insufficient to allege a claim against the defendants.

Thereafter the trial court filed its written decision, (R. 26-34) to the effect that the six motions to dismiss should be granted and the various defendants were entitled to their costs. Judgment of dismissal was made as to a number of defendants. (R. 36).

QUESTIONS PRESENTED

The questions presented in this appeal may be briefly stated as follows:

First. Where a fee patent has been forced upon a Ward Indian of the United States by the United States, without the application of the said Indian Ward, or without his consent, also without a finding of competency as to said Indian Ward, can the said Indian Ward prosecute an action to cancel said fee patent, or can he disregard the fee patent and maintain and prosecute his right of possession to the allotment

under the provisions of law and the express terms of the trust patent itself as against third persons who claim title and have possession under a tax deed conveyance made by Glacier County for delinquent taxes assessed and levied within the 25 year period of restriction?

Second. Can a restricted Ward Indian maintain and prosecute an action against the United States and third persons in possession of his allotment under claim of title based on a tax deed without the consent of the United States, the Ward Indian being excluded from his allotment only by the third part claimants?

Third. Can a restricted Ward Indian maintain an action against a third person in possession of his allotment under a claim of right based on a tax deed for taxes unlawfully assessed and levied against said allotment during the period of restriction, said Indian never having applied for or consented to the issuance of a fee patent, or even been found competent to be issued a fee patent?

Fourth. Can a Ward Indian maintain and prosecute an action to quiet title, secure his right of possession to his allotted lands before the termination of the trust period, he not having applied for or consented to the issuance of a fee patent, without making the United States a party defendant without its consent? or,

Fifth. Is the United States an **indispensable** party to an action prosecuted by an Indian Ward who is excluded from his allotment by a third party under

a tax deed claim for taxes assessed and levied before the termination of period of restriction on alienation? (A forced fee patent).

Sixth. Where an Indian Ward of the United States prosecutes an action against a third person claiming title to and having possession of said Indians allotment, under the facts set out in the preceding questions, is the United States an **Indispensable party** to the action?

Seventh. Is not an Indian Ward of the United States, excluded from his allotment during the trust period, expressly authorized to make the United States a defendant under Section 345, Title 25 U. S. C. A.?

Eighth. If such Indian Ward, under conditions set out in preceding question, is not expressly authorized under section 345, supra, does he not have **implied authority** to protect his right of possession and equitable title, or is such an Indian person at the mercy of an arbitrary Department of the United States without right of redress under present laws?

SPECIFICATIONS OF ERROR.

The appellants claim error on the part of the Trial Court as follows:

(1) The trial court erred in its decision and judgment in holding that the United States was and is an indispensable party to the action.

(2) The trial court erred in holding that the appellants could not prosecute the action without the consent of the United States and in dismissing the action

because the United States had not given its consent to be sued.

(3) The trial court erred in dismissing the complaint of the appellants as against all other defendants than the United States for the reason that the other defendants were alleged to claim title and possession to the allotments, and they alone were withholding possession and use of the land from the appellants; said defendants, other than the United States, had no community of interest with the United States and were without right in demanding the dismissal because the United States was an indispensable party and had not consented to be sued by appellants.

(4) The trial court erred in holding the appellants could not maintain and prosecute the action without a cancellation of the fee patent. Any party is entitled to assert any claim of right he may have to any interest he may claim in real property.

ARGUMENT

The question before the Court is as to the dismissal of the complaint of the Appellants on motion for dismissal by the United States and five other motions to dismiss on the part of other individual defendants. A motion to dismiss is equivalent to a demurrer and the allegations of the complaint are all taken as true for the purpose of the motion. The question before the Court in this action has been repeatedly considered by the Court in other actions, notably the case of the United States v. Glacier Co., 17 F. Supp. 411,

99 Fed. 2d. 733. With the exception of the parties involved, the Glacier County case is **identical.** Here the Appellants, Rose Gerard and her husband, are seeking to do for themselves what the United States did for some twenty-seven Blackfeet Indians in the Glacier County case just cited. In the Glacier County case the Ward Indians had fee patents forced upon them without their application or consent to the same during the period of restriction on alienation; in fact, the fee patents were issued within a short time after the issuance of the trust patents in 1918. The Indians involved in the Glacier County case afterwards lost their land through tax deeds, mortgages or other conveyances and the United States brought suit to recover the taxes that had been paid into Glacier County and to cancel the fee patents. One of the Indians involved in the Glacier County case, to-wit: Alice Aubrey Martin Whistler, had mortgaged her land and had likewise leased it for oil and gas and Judge Pray in his decision in that case held that she did not occupy a different status from the other Indians who had not mortgaged the land or otherwise conveyed it. In that case the Court held that the issuance of the fee patent under the identical circumstances that the fee patents were issued to the Appellants in this action were void and of no effect.

The Appellants requested the United States to bring an action to have their allotments restored to them but the United States, in this and other cases, has ignored the request of various Blackfeet Indians seek-

ing restoration of their allotments, where fee patents have been forced upon them, without avail. Appellants are now prosecuting this action for the purpose of doing for themselves what the United States has done for a great number of other Blackfeet Indians under the same facts and circumstances as exist as to the Appellants. The real question for the Court to decide is whether or not an Indian Ward may prosecute an action in his own name against defendants who have excluded him from his allotment, under claim of tax deed or other conveyance under the same situation and the same state of facts as exist with more than 500 other Blackfeet Indians, 27 of whom recovered their allotments in the Glacier County case, and recovered taxes that had been paid by them.

The Appellants commenced an action in the trial court more than a year prior to the commencement of this action, reported in 62 F. Supp. 28, in which action they did not make the United States a party defendant. In that action the trial court dismissed it on motions of various defendants for the reason that the United States had not been made a party defendant, holding that the United States was an indispensable party to the action. The Appellants did not appeal from that judgment for the reason that the complaint was dismissed without prejudice and the court indicated that a new action could be commenced and the United States made a party defendant so that the whole matter might be threshed out in a later action. This action and appeal is the result of the

judgment of dismissal in the former suit giving the appellants the right to file anew.

As To The United States. The motion of the United States for dismissal was based upon lack of jurisdiction and non-existence of consent to be sued, all of which is discussed under lack of jurisdiction. By Section 41 (1) (24) of Title 28 U. S. C. A., the United States consents to be sued in part as follows:

> "all actions, suits, or proceedings involving the right of any person in whole or in part of Indian blood or descent to any allotment of land under any law or treaty."

By Section 345 Title 25 U. S. C. A., it is provided:

> "all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any act of Congress or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress may commence or prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty"

The two latter sections, 41 of Title 28 and 345 of Title 25 are two sections of the same Act of March 3, 1911,

Chap. 231, 36 Stat. 1167, and 36 Stat. 1090. These two sections must be construed together and that portion of section 345 reading as follows:

> "or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States;"

The last clause is the identical claim of the Appellants here. They have been excluded from allotments, deprived of the possession thereof by the defendants, other than the United States, which defendants assert claim of title or interest by virtue of tax deed issued to Glacier County, Montana, and quit claim deed from Glacier County to one or more of the said defendants. This provision appears to have been overlooked by the trial court in that no comment is made as to it. The United States Attorney in his brief in the lower court alleged that the two sections, 345 of Title 25 and 41 (1) (24) of Title 28 are the same so far as they are material to this action but he did not discuss that portion of section 345 providing for suits by the Indian where he was excluded from or deprived of his allotment.

The foregoing sections and the case of U. S. v. Eastman, 118 F. 2d. 421, were the only authorities relied upon by the United States Attorney in his motion to dismiss.

The Appellants contend that there is but one law

governing the right of an Indian to protect his interest in lands allotted to him under the laws of the United States; title to the land technically vests in the United States so long as the trust period endures. The fee patents issued to the Appellants were void under the case of U. S. v. Glacier County, supra. Therefor the Status of the allotments issued to the Appellants in 1918 was in fact trust land during the period of restriction on alienation and that restriction on alienation was a **vested right** in the land and running with the land of which the United States or any officer thereof could not deprive the Appellants by subsequent act of Congress, or by depriving the Appellants of their right to come into court and ask for the relief which would give them possession of and equitable ownership in such allotted lands.

It was evidently the intention of Congress to consent that the United States be sued by an Indian person either to obtain an allotment, or to recover posseession and his right to the allotment from which he had been **excluded** and it has been the rule of the Federal courts from the earliest times, commencing at or before the case of Worcester v. Georgia, 6 Pet. 581. to construe statutes liberally in favor of the ignorant and dependent Indian and against the other party to the action. All of these matters are very ably considered in the Glacier County case. Another question that may be material is the clause contained in the fee patent issued to the Appellants reading as follows:

> "To have and to hold the same, together with all of the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of said claimant forever;"

It would appear that the latter provision contained in the fee patent may have been intended to reserve to the Indian patentee all of the restrictions contained in the trust patent or provided by law. It does not appear that any of the cases we have examined has so construed this provision but the provision is broad enough so that it gives constructive notice imposed by law or by the provisions of the trust patent to persons who might become purchasers or would-be purchasers. It is the established principle of law that a fee patent can not convey **what the law reserves.**

If the foregoing provision in the fee patents issued to the Appellants may be so construed, then the United States was never a necessary or indispensable party to the action, but the other defendants named in the action are necessary parties and the action should not have been dismissed as against them.

If the foregoing statutes do not authorize an Indian to sue the United States and make it a party defendant in his own right, without first securing the consent of the United States, it has been held to exist by necessary implication under the facts surrounding the question before the Court. Implied authority to make the United States a party may be assumed in this action by reason of the fact that the fee patents

were forced upon the Appellants without their application or consent and contrary to express provisions of treaty of 1887, heretofore cited, and the express provisions of Section 348 of Title 25 U. S. C. A., heretofore cited, and section 177 of Title 25 U. S. C. A., heretofore cited and discussed. The Appellants were and are powerless to recover possession of their allotments unles they can prosecute this suit to a conclusion, and if the United States is an indispensable party then the treaty and allotment act already cited should be held to give the Appellants **implied** authority to make the United States a party defendant.

The only authority cited by the United States in support of its motion to dismiss was the case of the United States v. Eastman, supra. The Appellants do not believe that case applies here for the reason that in the Eastman case the United States sought an injunction against the tribe to keep members of the tribe from cutting and selling timber from tribal lands. The basis of the case of the Appellants is the question of having been excluded and deprived of the possession of their allotments promised and guaranteed to them by the United States.

If the Eastman case is authority against the Appellants in their endeavor to make the United States a party defendant, we believe it has been overruled by the more recent case of Lee Arenas et al v. United States, 60 F. Supp. 411, and the previous decision of the Supreme Court to which the case had been appealed on a former trial, it having been dismissed in

the trial court and that judgment affirmed by the Circuit Court of Appeals on first trial upon the theory that the United States could not be sued without its consent. Section 345 of Title 25 U. S. C. A. was held to apply and gave Arenas and his associates the right to maintain the action against the United States. The situation of the Appellants is very like that of Arenas when he first commenced the action and it was summarily dismissed on motion of the United States. In its final decision this court treated the Indian as **non sui juris** holding, in effect, that the Indian could not consent to his own detriment or contrary to the laws enacted for his own protection. Under the recent case of United States v. Hellard, 64 S. Ct. Rep. 985, 322 U. S. 365, the court seems to hold that consent of the United States may be implied under certain circumstances and cites the case of Minnesota v. United States, 305 U. S. 382, 59 S. Ct. Rep. 292, 83 L. Ed. 235, wherein it was held that an action brought involving restricted Indian lands, jurisdiction to sue the United States is conferred by implication. The Appellants believe that the courts should hold in favor of the Appellants maintaining the action, if authority is not expressly conferred, then by necessary implication so that the Appellants may have their day in court and have their claims of right of possession and ownership confirmed. Any other decision would amount to confiscation of the allotted lands granted to the plaintiff by the United States. It is virtually impossible for an individual Indian to get consent

of the United States to maintain a suit against it and to permit the defendants, other than the United States, to have the suit dismissed against them for the alleged reason that the United States is an indispensable party, would work the grossest injustice and hardship upon the Appellants. It would have the effect of depriving them of their property without due process of law upon a technical question in procedure and not upon any substantive right those defendants may claim or interpose.

The situation of the Blackfeet Indian in 1918, and since then, is very similar to the condition of the Palm Springs Indians, the history of which tribe has been ably discussed by the Supreme Court in the Arenas case, and cited finally in reviewing the case on appeal by this court of appeals, 158 F. 2d. 730; this court cites from the Supreme Court criticizing the Secretary of the Interior for his failure to approve the allotments. The Appellants, and more than 500 other Blackfeet fee patentees, had these patents forced upon them within a very short period of time after the trust patent was issued in 1918. Why this was done is somewhat of a mystery. Perhaps it will come out if the Appellants are allowed to prosecute this action and have the opportunity to bring out the facts and circumstances under which the fee patents were issued. The department letter, heretofore cited, dated April 24, 1918, lacks an explanation of why the fee patents were being forced upon the Blackfeet allottees and that fact was brought out in the Glacier Coun-

ty case. Just why the United States prosecuted the action against Glacier County and cancelled some 27 of those forced fee patents and why it has since failed to cancel other forced fee patents issued during the same period of time as were the patents in the Glacier County case, has never been explained. It was clearly the duty of the Secretary of the Interior, upon the decision of this court cancelling the fee patents in the Glacier County case, to have proceeded and cancelled all fee patents issued under those circumstances. If that had been done by the Secretary at that time this and similar cases would not now be before this court. It would appear that the Department of the Interior was dissatisfied with the court's holding in the Glacier County case, and has since then pursued the policy of **doing nothing.** And now when the Appellants seek to obtain the relief they are clearly entitled to under the decisions of this court, the United States comes in and moves for dismissal because it has not given its consent. No doubt the same forces that thwarted the Palm Springs Indians from receiving their allotments was active and controlling as to the Blackfeet as fee patents were thrust upon them about that time. The attempt of Congress to right the wrong by enacting Section 349 of Title 25 U. S. C. A. has been disapproved by this court. As stated by the court in the Arenas case the Palm Springs Indians were "unlettered people, unskilled in the use of language," *****. This applies emphatically to the Blackfeet Indians who have been kept in confusion and em-

barrassment ever since 1918. They have not known what to do or what action to take—they have made repeated demands upon their superintendent and upon the Department of the Interior for more than 20 years trying to right the wrong that was done them, and they have been pushed from pillar to post and, apparently, **designedly** kept in confusion. The United States which should protect its Wards, in this case, appears and contests their right to prosecute the action in their own behalf.

As To the Defendants Other Than the United States. The decision of the lower court dismissed the Appellants' complaint as to the defendants, other than the United States, on the ground that the United States was an indispensable party. Other grounds alleged in the said motions were not given any special consideration as it appeared to be the theory of the trial court that the grounds alleged in the various motions amounted to a challenge to the jurisdiction of the trial court. It appeared to be the theory of the trial court that the complaint was sufficient and that the Court had jurisdiction if the United States was not an indispensable party. The trial court took the position that the United States was an indispensable party and it could not be sued without its consent. It did not give any consideration to the provision in section 345 of Title 25 U. S. C. A. to the clause setting out the right of an Indian to maintain a suit where he claimed to have been unlawfully "denied" or "excluded" from any allotment or any parcel of land to

which he claimed to have been lawfully entitled by virtue of any act of Congress.

The complaint conforms to the allegations of other complaints filed by the United States involving the right of Blackfeet Indians on the Blackfeet Indian Reservation, and it contains all of the essential matters alleged in other actions heretofore disposed of by the trial court and particularly to the actions entitled:

U. S. v. Glacier County, supra;
U. S. v. Frisbee et al, 57 F. Supp. 299.

The trial court specifically pointed out in the former decision, 62 F. Supp. 28, dismissing the former action as to the sufficiency of the complaint as follows:

> "Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition that it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a state court."

The fact that the Appellants have lost possession of their land through tax deeds, foreclosure of a mortgage, or any voluntary conveyance, is not material for the reason that the rights of the Blackfeet Indians in their allotments have repeatedly been declared by this Court to be **vested rights** and sections 349, 352a, and 352b of Title 25 U. S. C. A. do not constitute a defense and it is not necessary to negative those pro-

visions by allegations in the complaint. This question was very fully considered in this court in the case of U. S. v. Glacier County and many citations supporting that view were pointed out in that decision; attention to the Indian, Alice Aubrey Martin Whistler, in Glacier County Case is for all purposes **identical with the situation of the Appellants.** The defendant, Glacier County, in that case emphasized the situation of this particular Indian pointing out that she had mortgaged her land, that she had given an oil and gas lease, that she had voluntarily paid taxes and that she had refused to ask for cancellation of the fee patent, but notwithstanding these admissions, this Court held that she was entitled to the same consideration as the other Indians involved in that action, based upon the theory that the fee patent was void and could not divest her of her vested rights under the trust patent. In commenting upon Mrs. Whistler in the Glacier County case, Judge Pray said in his decision:

> "The Whistler lands rest upon the same state of facts and the same vested right held by the court to exist in respect to the other Indians, and therefor the court does not believe it should be governed by the statute offered in defense." (Referring to section 349 Title 25 U. S. C. A.)

See decision at page 28 in Transcript of record in the Glacier County case.

The trial court seemed to consider the complaint of the Appellants as a **collateral** attack on the fee patents issued to the Appellants. The complaint does

not ask for the cancellation of the fee patent and it does not make any direct allegation other than that the fee patent was void if construed to deprive the Appellants of their treaty and statutory rights as set forth in the trust patent. If the fee patents were construed to be subject to the restrictions and vested rights given the Appellants in their trust patents, they could receive the relief they sought without cancelling the fee patent. We have pointed out the clause in the fee patent and hold that it is subject to such construction. But if not subject to such a construction subordinating its provisions to the vested rights contained in the trust patent, the situation would be no different for the reason that the cases are very numerous protecting Indian rights in allotted lands to which the Indians had been given fee patent. In those cases, the court held that the fee patents were subject to existing law and rights guaranteed to the Indian by treaty and statute. Both state and federal courts have long recognized the right of an Indian ward to prosecute civil actions in his own right. A well considered early case is that of Wau-pe-man-qua v. Aldrich, (Ind.) 28 F. 489, where the Indian was held to have a right to maintain an action to declare a tax deed void, which tax deed had been issued more than twenty years prior to the suit, on the ground that the land, to which a fee patent had issued, was restricted and exempt from taxation by reason of Indian treaties and federal statutes in force at and prior to the time of suit. Other cases to the same effect are:

Felix v. Yakum, 77 Wash. 519, 137 P. 1037;
Proctor v. Painter, 43 F. 2d 974.

In the latter case it was held that a patent in fee, where the reservation is not set out in the fee patent, does not convey what the law reserves. Appearing to be to the same effect are:

Adams v. Hoskins, 259 P. 136;
Miller v. Tidal Oil Co. (Olk.) 265 P. 648;
Grotkop v. Stukey (Okl. 1929) 282 P. 611.

In the case of the United States v. the City of Salamanka (D. C. N. Y. 1939) 27 F. Supp. 541, the defense raised the question of the right of the United States to sue in its own court to enforce its own obligations to the Indians and the court observed that even though **the Indian himself could bring the action,** the United States also had jurisdiction to maintain such action for the benefit of its Indian Ward.

This Court held that no right conferred on an Indian allottee can be arbitrarily abrogated or changed by statute, and the United States as trustee, can not liquidate the trust without the consent of the allottee.

U. S. v. Ferry Co. Wash., 24 F. Supp. 399;
Board of Commissioners of Jackson Co. Kan. v. U. S., 100 F. 2d. 929;
U. S. v. Glacier County, supra;
U. S. v. Spaeth (Minn) 24 F. Supp. 365;
Ytatahwah v. Rebock et al (Ia.) 105 F. 257;
Felix v. Patrick, 105 U. S. 317, 36 L. Ed. 719;
Laughton v. Nadeau (Kan.) 75 F. 789;

27 Am. Jur. 550, 565, 566—Title "Indians."
The Kansas Indians, 5 Wall 737.

It would appear that the granting of a fee patent to a restricted Indian does not change the character or status of the trust title.

Wau-pe-man-qua v. Aldrich, supra; and
The Kansas Indians, supra.

A deed of conveyance by an Indian under restriction to convey is of no effect,

Sec. 177 Title 25 U. S. C. A. and annotations to that section Nos. 9½ and 23;
Smythe v. Henry (C. C. N. C.) 41 F. 705;
Dawes v. Brady (Okl. 1925) 241 P. 147.

Persons dealing with Indians must take notice of public treaties and acts of Congress, and do not take land as bona fide purchasers, relieved from restrictions on alienation merely because no such restrictions appear in the patent. Laughton v. Nadeau, supra.

On the same subject American Jurisprudence states the rule as follows:

> " It has been ruled that restrictions on the right of an allottee to convey for a specified period do not deprive the title of the character of a fee simple estate, but are rather in the nature of conditions subsequent. It is well settled that a conveyance executed in violation of such a restriction is void and conveys no title whatever to the grantee. The restrictions are a matter of governmental policy, therefor, no rule of property will avail to defeat them.

27 Am. Jur. 566 (Sec. 39 and notes);
U. S. v. Sherburne Mercantile Co., 68 F. 2d. 155.

This Court is referred to the citations of authority in the cases heretofore cited, and especially those cases involving the forced fee patents issued to Blackfeet Indians. The authorities cited by this court in its decision in the United States v. Glacier County, supra, are equally applicable here and commended to the attention of the court without further citation. Where a conveyance of Indian land is prohibited or restricted, a conveyance by the Indian, voluntary or involuntary, can not be ratified and the conveyance made legal by subsequent legislative action. That question was considered by this Court in the Glacier County case and held to be the law. See also:

Tiger v. Western Inv. Co., (Okl.) 96 P. 602, 31 S. Ct. Rep. 578, 221 U. S. 286;
Felix v. Yakum, supra.

The Appellants have found no authority holding that an Indian Ward can not prosecute an action in all cases as against any person—except possibly the United States, in matters involving his right to an allotment where he is being denied or excluded from an allotment he claims to be entitled to. We believe that the trial court erred in dismissing the complaint as to the defendants, other than the United States, as they are the persons directly depriving and excluding the Appellants from their allotments. They are not considered innocent purchasers for value from a

Ward of the United States, and they are now seeking the protection of the United States contrary to the direct promise and obligation of the United States to protect its Ward Indians in and to lands allotted to them.

CONCLUSION

The Appellants submit that they are entitled to prosecute this action upon one or more of the theories heretofore advanced, summarized as follows:

1. As against all of the defendants including the United States;

2. (a) That the United States has expressly consented to the maintenance of this action by virtue of its treaty obligations and sections 345, 348 and 177 of Title 25 U. S. C. A.

(b) That if there is no express consent given by Congress on the part of the United States, then the United States may be made a party by necessary implication.

U. S. v. Hellard, supra;
Minnesota v. U. S., supra;
Heckman v. U. S. 32 S. Ct. 424.

3. That the lower court erred in dismissing plaintiffs complaint as against defendants other than the United States.

Respectfully submitted,

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